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118). In effect these transactions constituted a transfer from Coon to the Culbertson boys and all parties so understood (R. 75, 88, 98, 102, 106).

Initially Coon had directed his nephew, W. H. Coon, to close the deal for him (R. 75) and later he inquired whether his interest actually had been conveyed to the Culbertson boys (R. 76).

The organization of W. O. Culbertson & Sons was widely publicized in the Hereford business (R. 77). By letter of October 23, 1939 the National Credit Finance Corporation, the company theretofore handling Coon & Culbertson's loans, was notified of the dissolution of Coon & Culbertson, the organization of W. O. Culbertson & Sons and the fact that it would carry on Coon & Culbertson's business (R. 77, 81; Ex. 4, R. 136). The old Coon & Culbertson certificate of membership in the American Hereford Association, with offices at Kansas City was surrendered and on November 13, 1939 a new certificate issued to W. O. Culbertson & Sons changing the registration of the foundation herd (R. 77, 110; Ex. 7, R. 143). In the Dalhart *Texan* of December 2, 1939 the dissolution of Coon & Culbertson and the organization of the new partnership was featured (R. 77; Ex. 3, R. 135). A bank account was opened for the new partnership upon which all of the partners could check (R. 93, 95); partnership books were set up with entries for October and November 1939 (R. 93); as none of the partners knew what capital accounts were, no capital

accounts were included (R. 100, 101, 124, 131); stationery was printed containing the names of Respondent and the four boys and "W. O. Culbertson & Sons, Successors to Coon & Culbertson" (R. 110; Ex. 8, R. 144). No assumed name affidavit was filed of public record as the partners did not know one was required (R. 118, 127). W. O. Culbertson & Sons was not an assumed name. There being no partnership income for 1939 no partnership return was filed (R. 124). The 1940 partnership return contained a statement that the partnership was organized January 1, 1940; Respondent did not inspect this return, or any other return, and was not qualified to do so (R. 111).

After the formation of the partnership, its activities were systemized and plans laid for the future (R. 94). Partnership activities fell into two classifications — office work and ranch work (R. 91, 92); office work consisted of maintaining contacts with prospective customers, buying and selling cattle and arranging loans to carry on partnership operations (R. 92); it was agreed that Respondent, who could not do physical work due to an injured hip (R. 111) was to be primarily responsible for such work (R. 97, 103, 110, 118), although he regularly consulted with all partners with respect to such problems and all partners participated in the determination of partnership policies and major decisions (R. 98, 129). The cattle ranged over 52,000 acres of leased land (R. 102) and ranch work consisted of caring for the cattle — the establishment of a

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NO. 313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

COMMISSIONER OF INTERNAL REVENUE
Petitioner

v.

W. O. CULBERTSON, SR.
AND
GLADYS CULBERTSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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COMMERCIAL RECORDER, FORT WORTH, TEXAS—1-30-49—100

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Opinions Below

The memorandum opinion of Judge Disney of the Tax Court (R. 31-56) is not officially reported. The unanimous opinion of the Court of Appeals (R. 181-188) is reported in 168 F. 2(d) 979.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1948 (R. 188). Writ of certiorari was was granted on December 6, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTION PRESENTED

Did the Court of Appeals err in holding that Respondents Culbertson were not to be taxed upon the profits of a partnership interest formerly belonging to one Coon — unrelated to the Culbertsons — who had retired from the partnership of Coon & Culbertson upon condition that the Culbertson boys acquire his interest, take his place in the partnership, and carry on the cattle breeding program he had originated thirty-seven years previously.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, infra, pp. 49-52.

STATEMENT OF THE CASE

The petition for a writ of certiorari inadequately states the facts.

In 1902, R. S. (Uncle Dick) Coon began the breeding of pureblood Hereford cattle and it remained one of the engrossing interests of his life thereafter (R. 73, 74, 106). In 1915 Coon and Respondent[1] organized the equal partnership of Coon & Culbertson, operating in the Texas Panhandle and New Mexico (R. 71, 84), devoted to the breeding and sale of an outstanding type of registered Hereford (R. 72, 74).

---

[1]As Gladys Culbertson does not figure in the facts, W. O. Culbertson, Sr. will be referred to as Respondent.

That partnership became famous because of the Domino Hereford blood strain in its cattle (R. 72; Ex. 3, R. 135). Because of Coon's wealth, this partnership, unlike many others, did not fail in the depression years (R. 107) and by 1939 it had several thousand head of registered Hereford cattle, unregistered Herefords, commercial or grade cattle, (R. 74, 85) Brafords (a cross between Brahmas and Herefords (R. 80)) and the usual accessories — horses and equipment — ranging and located on some 52,000 acres (82 square miles) of leased land in New Mexico (R. 102). The partnership owned no land (R. 102); Coon was engaged in many businesses (R. 72); Respondent's assets, other than his interest in Coon & Culbertson, were insignificant (R. 103, 127). In 1939 and later years Respondent lived in Dalhart, Texas some 93 miles from the ranch (R. 98, 103, 129). Coon was not related to the Culbertsons (R. 97).

Respondent's sons, W. O., Jr.,[2] Richard, Joe Jack and Eugene, were reared on the ranch and began ranch work at around twelve years of age doing all the kinds of work then available (R. 74, 85, 87). Until they went into the Army in 1941 and 1942 (R. 93, 100) their time was divided between going to school and working on the ranch (R. 79, 80, 93). Over the years Coon, who was childless (R. 71), took a great interest in their development and over Respondent's resistance (R. 97, 104) he sent W. O. and later Richard to Texas A. & M. College where they completed

[2]Hereinafter referred to as W. O.

Animal Husbandry courses (R. 72, 86, 87, 103); when he died in 1941 (R. 74) he left money by will to Joe Jack and Eugene to assist in their college educations (R. 103, 104). Upon graduation from college in 1938, W. O. became ranch foreman for Coon & Culbertson (R. 72, 86).

In the spring of 1939 Coon, because of his age and health (R. 71) was forced to retire from business and Coon & Culbertson was put into liquidation (R. 72, 74). During the liquidation the Culbertson boys contracted to purchase 350 head of Brafords but prior to delivery, one East offered to purchase them and the Culbertson boys, upon the advice of Coon, sold them to East at $5.00 per head profit (R. 86, 87, 99, 103). By October 1939 all of the partnership assets had been sold to third parties except the breeding herd of approximately 1400 head — the "cream of the crop" and the foundation of the famous Domino strain (R. 73, 74, 86) — several herd sires, a group of bulls and miscellaneous cows and the horses, equipment and grass leases (R. 92, 97, 99, 102, 103).

At this juncture Respondent offered to purchase Coon's interest in the breeding herd at a price equal to the average per head for cattle — registered, unregistered and commercial — previously sold (R. 72, 73, 106). On the night of the day the offer was made, Coon, Respondent, Williams, Coon's crony, and W. H. Coon, Coon's nephew and Panhandle representative, met at the Coon & Culbertson office in Dalhart and discussed the offer (R. 72, 75, 106, 127).

Coon was "very concerned about what would be done with these pure blood cattle" (R. 72); he anxiously desired the perpetuation of the blood lines of the foundation herd (R. 75) and realized that project to be a lifetime task (R. 75, 106). He thought Respondent was too old to carry the breeding program on alone but that Respondent and the Culbertson boys could accomplish the desired purpose (R. 75). Hence, after "We done a lot of visiting, talking about the herd and the hardships and hazards we'd went through" (R. 106), Coon did not accept Respondent's offer to buy, on his own account, Coon's one-half interest in the foundation herd, but proposed to Respondent to sell him his interest in that herd, at the specified price, provided Respondent would sell this one-half interest to the Culbertson boys at the same price and allow them to take his place in the partnership. (Williams (R. 72-3); W. H. Coon (R. 75, 78); Respondent (R. 107)). Apparently Coon had planned on the Culbertson boys acquiring his interest for some time and all parties understood that in reality Coon was selling his interest in the foundation herd to the Culbertson boys (R. 88, 98, 102, 107). The price specified was a bargain price (R. 88, 90, 91, 127).

Respondent advised Coon that he would discuss the proposal with the Culbertson boys (R. 75, 107) and on the next day he went to the ranch and told them, "Mr. Coon wants to sell his interest in the cattle

[1]Richard was then in Texas A. & M. College and was consulted later (R. 105).

to you four boys" (R. 88, 98, 107). The proposal was discussed and W. O. inquired how the purchase was to be financed and Respondent volunteered to help the boys out (R. 88, 118). It was agreed that the proposal would be accepted and, provided the boys acquired Coon's interest (R. 103), a partnership between the Respondent and the Culbertson boys, to be called "W. O. Culbertson & Sons" would be organized (R. 88, 98, 107) to which Respondent would contribute his one-half interest and each of the boys an one-eighth interest (R. 89, 90, 98, 103), and profits and losses were to be divided according to ownership (R. 90, 108) and "no individual was to have any more right than the other but we'd all have a right to manage the ranch" (R. 90).

Several days later W. O. discussed the purchase with Coon and thanked him for his offer and particularly for the bargain price at which the boys were acquiring his one-half interest; the new partnership and the financing of the boys' purchase were discussed; Coon told W. O. that he wanted the Culbertson boys to take over the herd and carry on the Domino strain of blood in the breeding of Herefords; Coon inquired if the boys had been able to finance their purchase and advised W. O. that if they ran into difficulties, he would handle the financing (R. 88, 90, 91).

Around November 1, 1939 the herd was tallied (R. 75; Ex. 4, R. 175). The conveyances took the form

of a bill of sale from Coon & Culbertson to Respondent and another from Respondent to the Culbertson boys, rather than a direct transfer from Coon to the boys, at the suggestion of W. H. Coon (R. 76, 107) because "our books were set up that way" (R. 76). On November 4, 1939 Coon & Culbertson executed a bill of sale to Respondent for 1,401 registered Hereford cows, heifers and calves, 32 registered Hereford bulls and Real Prince Domino 100th and Jayhawker Domino and Respondent gave Coon & Culbertson a check for $99,440.00 (R. 76, Ex. 1, R. 133). On November 6, 1939 Respondent executed and delivered to the four Culbertson boys, in the presence of W. H. Coon and a cattle inspector, a bill of sale to an undivided one-half interest in the same cattle, and the Culbertson boys executed and delivered to Respondent their promissory note for $49,720.00 — one-half of $99,440.00 (R. 76, 89, 109; Ex. 2, R. 134). The boys' note was due one year from date and bore four per cent interest (R. 89, 109). This was a transfer of the absolute title to an undivided one-half interest in the cattle to the Culbertson boys, there being no strings or conditions whatsoever attached to the bill of sale from Culbertson, other than the obligation of the boys to pay their note (R. 92, 109). While Respondent testified that, at the time, he gave no thought to whether the boys would be able to pay the note in one year (R. 118), he and the Culbertson boys understood that they had to pay the note (R. 89, 90, 92, 100, 109). In agreeing to finance the purchase by the Culbertson boys Respondent did not intend to make any gift (R.

feeding program, feeding, watering, calving, affording protection from the elements; hiring, firing, paying, feeding, housing and directing the activities of employees; maintenance of the ranch and equipment (R. 91, 92); and of prime importance to this partnership, the formulation and execution of a breeding program: the establishment of an objective — the type of animal to be produced — the selection of herd sires and cows which by conformation and blood lines were designed to produce calves approaching the objective, the segregation and mating of such selections, the indentification of offspring by ear tattooing, the maintenance of absolutely accurate records warranting the certification of the blood lines of each calf, and the acquisition of such certification from the Hereford Association (R. 85, 91, 94, 102). It was agreed that ranch work would be the province of the Culbertson boys (R.94) and W. O. was to become General Manager of the ranch (R. 78, 79, 110, 118, 130). It was agreed that the younger brothers would best serve the interest of the partnership by completing their educations and, in the meantime, working on the ranch under W. O.'s supervision at every opportunity (R. 80, 94), and upon graduation, each was to take charge of some certain phase of partnership activities (R. 94). By agreement of all partners, each partner was to draw what money he needed but all withdrawals were to be as nearly equal as possible (R. 95).

During the acquisition of Coon's interest and the formation of W. O. Culbertson & Sons, Respondent

requested W. H. Coon to open a line of credit with the National Finance Credit Corporation for the new partnership (R. 77). On October 23, 1939 W. H. Coon wrote A. A. Wright, Manager of the Credit Company, advising him of the liquidation of Coon & Culbertson and that W. O. Culbertson & Sons would take over the herd on November 1, 1939 and desired to establish a line of credit (R. 77; Ex. 4, R. 136). After this date and prior to December 8, 1939 (R. 84) Respondent advised Wright that he and his sons had organized a new partnership (R. 82) and that the new partnership desired a line of credit and when Wright ascertained that two of the parthers were minors he advised Respondent "In order for him to pass a loan with his company" for Respondent to have an attorney draw some kind of document which would be acceptable to the credit company's attorney (R. 81, 83, 113). The only thing Wright was interested in was for Respondent to have authority to sign for the minors (R. 83). Respondent took the matter to a local Dalhart attorney, Stallcup, advised him of Wright's suggestion and directed him to prepare a document to meet such suggestion (R. 113). Respondent did not instruct Stallcup as to any of the terms of the document. (R. 114, 115, 119-122). Stallcup prepared a document which Respondent signed (Ex. 5., R. 137). This document, dated December 8, 1939, purported to convey an undivided one-half interest in certain cattle, ranch equipment, leases and other property to the four Culbertson sons; it reserved to the grantors exclusive control and management of

the properties conveyed until the youngest son became twenty-one; grantors were not to be liable for losses arising from such management; none of the Culbertson boys could withdraw his interest in the properties; in the event of the death of one of them, without wife or child, his interest was to vest in the grantors, his brothers and sister and, if with surviving wife and child, in such wife and child. The document was sent to Wright (R. 115) and no further use was made of it except that when Respondent sold a part of his interest in the partnership to his daughter, Fannie, Stallcup drew another document referring to it (R. 116) because Fannie was a minor and Respondent thought some such document was necessary in connection with loans (R. 126). The December 8th document was not filed of record (R. 116); none of its terms were carried out (R. 116). One of the partnership duties which by agreement Respondent assumed was to handle partnership financing (R. 97, 128). In order to handle such financing, and for no other purpose, Respondent followed Wright's suggestion and had the document prepared, not for the purpose of reducing the partnership agreement to writing (R. 119) but for the sole purpose of enabling the partnership to borrow money to carry on its business (R. 115, 123, 128). In signing the document Respondent did not intend to attempt to change or qualify anything that had therefore existed — the boys' one-half ownership of the cattle or the partnership (R. 115) and he did not realize that the document might affect the partnership in any way until Revenue

Agent Jordan so told him in 1943 (R. 115, 123, 128). For these reasons Respondent did not think that the boys would be concerned with the document and he did not inquire if they would agree to it (R. 127) nor did he advised them of the existence of the document until after a conference with Jordan in 1943 (R. 96, 101, 117, 126). Respondent did not understand the document.[4] None of the boys signed the document (R. 96, 126) and their first notice of its existence was accompanied by Respondent's repudiation of the document, in 1943 (R. 96, 116, 126). After Revenue Agent Jordan had questioned the partnership, Respondent again conferred with Wright and at the latter's suggestion employed a Fort Worth accountant to handle the present tax matter (R. 116) and upon the accountant's recommendation that the Culbertson boys bring a proceeding in the State Court to ascertain the validity of the partnership and the effect of the December 8th document, Respondent then advised the Culbertson boys — all of whom were in the Army — of the existence of the document (R. 96, 116) and wrote W. O. recommending that the boys authorize such a suit (R. 96, 116). The sons authorized Respondent to have the suit brought (R. 97, 116) and Respondent employed Stallcup, who filed a suit for the four Culbertson boys and their sister against Respondents in the District Court of Dallam County, Texas and,

[4]Respondent did not read it; when it was read to him, Respondent merely asked Stallcup if it would be acceptable to Wright and Stallcup replied that it would (R. 115). Respondent's practice in dealing with his attornies is to do what they tell him to do (R. 115).

after a hearing, that Court returned a judgment that the Document of December 8th was void and the partnership of November 1939 was valid in all things. (Ex. 9., R. 145).

After the acquisition of Coon's interest in November 1939, questions arose as to the disposition of the Coon & Culbertson grass leases, horses, miscellaneous cattle, certain bulls, supplies and ranching equipment (R. 78, 92, 103); W. O. Culbertson & Sons concluded to purchase such items (R. 78, 92, 103). In line with this, the November 6th note of the Culbertson boys to Respondent was destroyed and a new note dated January 1, 1940, in the sum of $57,674.80 was executed by each of the boys and delivered to Respondent (R. 92; Ex. 6, R. 142). Later in January, 1940, Coon & Culbertson had an opportunity to sell the bulls and did so (R. 93) and the note was credited with $5,930.-00 reducing it to $51,744.80 (R. 92, 93, 95, 99). On December 30, 1940 Respondent gave to each of the four boys a $1,000.00 credit on the note, reducing it to $47,744.80 (R. 96). In mid 1941 the partnership of W. O. Culbertson & Sons borrowed $60,000.00 from the National Finance Corporation and turned it over to Respondent and Respondent credited the note with $30,000.00, reducing it to $17,744.80 (R. 96). The partnership, from its operations, later repaid this $60,-000.00 note (R. 104, 129) and no part of the $30,000.00 credit was a gift (R. 100, 104, 129). On June 10, 1941 Respondent made further gifts to the boys of the balance due, $17,744.80, and canceled the note (R. 96, 100;

Ex. 6, R. 142). Although a retained copy of his gift tax return was shown him, Respondent did not know whether he had filed returns covering the 1941 gifts (R. 111); the Commissioner made no contention that he had not done so (R. 112).

During 1940 and 1941 all of the partnership income came from the cattle (R. 95).

In 1940 W. O. was twenty-four years of age and married, Richard twenty-two and married, Joe Jack eighteen and Eugene sixteen (R. 93); all were man-sized and capable of doing a full ranching day's work (R. 73, 93). Upon the organization of the new partnership W. O., who had been foreman for Coon & Culbertson at a salary of $100.00 per month, became General Manager of the ranch and, by agreement of the boys, continued to draw as living expenses approximately the same amount (R. 95, 98). As manager during the tax years he had charge of and handled all ranching activities over the entire ranch, including the formulation and execution of the breeding program, the hiring and firing and supervising of all employees, the payment of all ranch expenditures, and the feeding and care of the cattle (R. 78,79,91,94, 95,110,118,130). In addition W. O., Richard, Joe Jack and Eugene did all tattooing, the certification of offspring, and in the fall prepared all registry papers with respect to offspring dropped during the tax years (R. 78, 94). During 1940 and 1941 Richard and Joe Jack continued their schooling in keeping with the part-

nership agreement and worked on the ranch when they were not in school up to the time they went into the Army (R. 78, 79, 80, 93, 100). During 1940 Richard was enrolled in Texas A. & M. but worked on the ranch during the summer and fall up until school time (R. 93, 100, 130); he graduated in May 1941 and went directly into the Army (R. 94). In 1940 Joe Jack worked on the ranch during the three summer months and on week-ends; he started to Texas A. & M. in the fall of 1940 but worked on the ranch during the summer months of 1941 (R. 94). During 1940 and 1941 Eugene worked on the ranch during the three summer months and on week-ends (R. 94). While at the ranch the three younger boys performed whatever work was available under the supervision of W. O. (R. 94, 130). Other than occasionally discussing ranching activities with W. O. (R. 95) Respondent performed no ranch work and, in fact, visited the ranch on an average of only once each month (R. 95, 103). At no time did Respondent attempt to tell W. O. how the ranch should be operated (R. 111). During 1940 and 1941 Respondent took care of the Dalhart office, handled contracts for the sale of cattle and arranged loans (R. 113, 119). In answer to the Court's interrogation, Respondent testified that, "The policies of the partnership as to when to buy cattle and when to sell" were determined by discussion of all of the partners; that he relied upon the boys' judgment in respect to policy matters and not his own and that if they did not want to do a certain thing it was not done (R. 129). During 1940 and 1941 the Culbert-

son boys drew from the partnership whatever funds they needed (R. 95).

Tax motives were entirely absent in the transactions involving the acquisition of Coon's interest and the formation of the new partnership; taxes were not mentioned nor did they have a bearing upon what was done (R. 80, 97, 112); it did not occur to Respondent that tax considerations were involved (R. 112). Respondent is a man of limited education; his schooling ended with the eighth grade, at which time he went to work on cow ranches (R. 112). Other than in signing returns prepared by others, Respondent had had no tax experience (R. 112). In late 1940, after talking it over with the Culbertson boys (R. 101), Respondent sold his daughter, Fannie, an one-eighth interest out of his one-half interest in the partnership for which he took her note (R. 101, 123; Ex. A., R. 150); it was later canceled as a gift (R. 122). While Respondent personally thought that his daughter was a partner, upon the advice of counsel, no claim was made in the Tax Court or the Court of Appeals that she was a partner for tax purposes (R. 12, 115, 122, 123).

A. A. Wright testified that he had been manager of the credit company since 1930 and during that time it had loaned some three-hundred million dollars to its cattle raisers (R. 81); that as the source of finances, he maintained a confidential relationship with borrowers and such borrowers frequently talked their problems with him (R. 81). As cattle raisers have

"to get a liking for the lifestock business as a child", and as the cattle business is a lifetime proposition, his policy in discussing loans and problems with cattle raisers having sons is to recommend the borrower taking his sons into the partnership with him (R. 82, 84) and, as such sons rarely have capital, he suggests time purchases or gifts in order to qualify the sons as partners (R. 82, 84). This strengthens the loan because it enables the business to continue if the father becomes incapacitated, it supplies the indispensible inducement and incentive to stay on the ranch and it opposes the trend of young men leaving ranches and going to urban employment. Approximately ten per cent of his company's loans over the years have been made to father and son cattle partnerships (R. 82, 84).

SUMMARY OF ARGUMENT

I.

The *Tower* and *Lusthaus* cases are not applicable here, and the sons' share of the income of W. O. Culbertson & Sons should not be taxed to Respondent, because:

A. The sons unconditionally acquired Coon's one-half interest in the brood herd in an arms-length, bona fide transaction and their contribution of such interest to the partnership did not divest them of their rights, tax-wise or otherwise;

B. The transactions terminating in the organization of W. O. Culbertson & Sons did not result in splitting or re-allocating Respondent's pre-existing income, but, from the viewpoint of the Culbertson family, constituted the acquisition of additional property and income; and

C. Coon's sale to Respondent, Respondent's sale to the Culbertson boys, and the organization of W. O. Culbertson & Sons, were phases of the same transaction; there is no legal justification for the Tax Court's action in recognizing the first phase and ignoring the latter two.

II.

If the *Tower* and *Lusthaus* cases are applicable, then the judgment of the Court of Appeals was correct, because the Tax Court erroneously disregarded most of the legal principles established in those cases for the determination of the tax-validity of a family partnership, giving consideration only to the principle having to do with the contribution of capital and the rendition of services — which it improperly applied.

ARGUMENT

I.

A father is not taxable upon the income of an undivided one-half interest in cattle unconditionally acquired by his sons, in an arms-length, bona fide transaction with a third party, and contributed to the

father and son's partnership — the third party having conditioned his agreement to sell upon such acquisition and contribution. That plain matter of law, arising from and supported by both the undisputed evidence and the findings of fact of the Tax Court, was perceived by the Court of Appeals and impelled its holding. A brief review of the facts and findings will present the issue.

At the outset, the mind can be freed of the question whether the Coon-Respondent-Culbertson boys' transactions of October-November, 1939 were in substance what they appeared to be in form; the possibility of tax consequences did not occur to the parties (R. 80, 97, 112) and no contrary assertion has been or is made.

In October, 1939, Uncle Dick Coon and Respondent each owned an undivided one-half interest in the Hereford cattle breeding partnership of Coon & Culbertson and its cattle (R. 73); neither had any claim to the other's one-half interest. Coon, retiring, was intent upon assuring the continuation of his life's work — the breeding of Domino Herefords — which Coon & Culbertson had carried to an advanced stage (R. 72; Ex. 3, R. 135). He thought Respondent was too old to carry on this long-range program (R. 75); he was well acquainted with the grown and nearly-grown Culbertson boys and familiar with their resources and qualifications (R. 72). Consequently when Respondent made him an offer to purchase his interest in the

brood herd — the apex of Coon-Culbertson achievement — he was ready with his plan (R. 72). Witnesses Williams (R. 71-3) and W. H. Coon — unrelated to the Culbertsons (R. 74) — detailed the resulting contract (R. 75):

> "I don't remember his exact words in that connection but Mr. Culbertson had made him an offer on these cattle that would clean him up and I recall that Mr. Coon didn't think that Mr. Culbertson could carry that herd on by himself, due to his age. Mr. Coon told Mr. Culbertson, 'You can go on with it with the assistance of your boys' and he said, 'I will accept your proposition. I will sell you my interest in these cattle if they can take my place, if you will sell it to them, just like I sell it to you, and continue on with this herd of cattle, providing they want to do it.' Mr. Coon added, 'W. H. (meaning me) here will close the deal with you.' Mr. Culbertson said, 'I will discuss it with the boys. I am sure they will.' In accepting Mr. Culbertson's proposition, he stated that he was willing to accept it if the Culbertson boy would step into his place; that is what he meant by saying the he would sell to Mr. Culbertson if Culbertson, in turn, sell to the boys so that they would take his place."

The Tax Court found that "at about that time" Respondent offered to buy Coon's interest and that Coon accepted the offer "provided Petitioner (Respondent) would sell his four sons an undivided one-

half interest in the herd at the same price" (R. 33); that Respondent discussed this offer with the Culbertson boys and they agreed, and that Respondent "offered to finance the purchase of the undivided one-half interest for the boys" (R. 33, 34); Coon made the same offer a few days later (R. 91). The Tax Court further found that on November 4, 1939, Coon & Culbertson gave Respondent a bill of sale to the brood herd for which Respondent gave the partnership a $99,440.00 check; two days later Respondent and wife executed to the four Culbertson boys and delivered to W. O. a bill of sale to an undivided one-half interest in the same cattle, and the Culbertson boys gave Respondent their note for $49,720.00 bearing interest at four percent and due in one year "for the one-half undivided interest in the cattle described in the bill of sale" (R. 34). Coon later checked to see if the Culbertson boys had acquired his interest (R. 76).

Respondent, individually, tried to purchase Coon's interest; he failed. Coon conditioned his agreement to sell to Respondent upon two things: that Respondent would sell to the Culbertson boys "just like" Coon sold to Respondent, and that the Culbertson boys would take Coon's place in the partnership, for the purpose of "carrying that herd on" (R. 75, 91). These were not sophisticates dealing in innuendo or terms of pretense; they were ranchers, having confidence in each other, speaking in plain terms and each fully understanding the other.

Petitioner contends (Petition Brief, p. 12) that the Court of Appeals adopted "a formalistic test" based on "bare legal title". Respondent was the only person who held a bare legal title and then only for two days — November 4 to November 6, 1939. To claim that he had more is to rely upon a formalistic test. In honesty, in morals and in law, Respondent was never the true owner of Coon's interest; the record is quite bare of anything to show that he did acquire or could have acquired the beneficial title to Coon's interest. No Court would heed a contention by Respondent, were he to make one, that he acquired fee simple title to that interest. Respondent's acquisition of "bare legal title" cannot be separated from his obligation to convey it to the boys just like Coon conveyed it to him, for the former was conditioned upon the latter. At best, for two days Respondent was a trustee of the title; that the title was conveyed to him and not directly from Coon to the four boys was coincidental and arose only at W. H. Coon's suggestion (R. 76, 107). All parties understood Coon was selling to the four Culbertson boys (R. 75, 88, 98, 102, 106). No argument is needed to show that either Coon or the four Culbertson boys could have legally forced Respondent to convey the Coon interest to the boys.

As of November 6, 1939, Respondent had fulfilled his contract with Coon; he had conveyed the Coon interest to the boys without strings or conditions (R. 92, 109, 184). Pursuant to his offer, the boys had delivered to him their joint note in good faith and full

knowledge that it had to be paid, unconditionally (R. 89, 90, 92, 100, 109). Respondent retained no lien and the substance of the transaction would not have been altered if he had. There were no agreements or understandings as to the application of profits to the payment of the boys' note or that the note would be forgiven or that the transaction was colorable or a sham. That Respondent initially paid Coon the purchase price (R. 34) and later voluntarily forgave two-fifths of the note (R. 34) and that Respondent, in order to secure a line of credit for the partnership, signed an ex parte document which purported to reconvey an undivided one-half interest to the sons but subject to new terms and conditions (R. 115, 123, 128), can not retroactively change the bona fides of the November, 1939 transactions or alter their economic and legal effect. This is the purport of the decision of the Court of Appeals (R. 183-7) and that decision is correct. *Hoeper* v. *Tax Commission*, 284 U.S. 206, 52 S.Ct. 120, 76 L.Ed. 248; *Blair* v. *Commissioner*, 300 U.S. 5, 57 S. Ct. 330, 81 L. Ed. 465; *Durwood* v. *Commissioner*, (CA8) 159 F. 2(d) 400.

A corollary of the foregoing is that, unlike the *Tower*[5] and *Lusthaus*[6] cases, this case, from the standpoint of the Culbertson family, involves the acquisition of additional property and income and not

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[5] *Commissioner* v. *Tower*, 327 U.S. 280, S.Ct. 532, 90 L.Ed. 670.
[6] *Lusthaus* v. *Commissioner*, 327 U.S. 293, 66 S.Ct. 539, 90 L. Ed. 679. With respect to the substance of the dissimilarities, see *Walsh* v. *Commissioner*, (CA8) 170 F.2(d) 535 at 539.

the splitting of pre-existing income among family members in order to reduce taxes. *Durwood* v. *Commissioner*, supra. The *Tower* and *Lusthaus* cases dealt with a broad, but bounded, type of situation; they dealt with husband and wife, members of a marital union and not father and grown or nearly-grown sons — and there are substantial social, economic and legal differences; they considered artificial, tax-inspired partnerships and not genuine unions motivated by present and potential practical benefits to accrue to each partner by the joinder of the others; they followed "a general pattern found in many of the 'family partnership' cases" 327 U.S. at 285: they involved a purported division of what had been, admittedly, the taxpayer's right to income and they found that the economic substance of the transaction was insufficient to support the claimed division of tax liability. In the present case, the Culbertson boys neither claim, nor have they received, any property or income which belonged to Respondent prior to the creation of W. O. Culbertson & Sons; they do claim the Coon interest and have paid taxes upon the income derived therefrom. Respondent makes no contention that he is not taxable upon the income from the one-half interest he owned both before and after the organization of W. O. Culbertson & Sons. There is nothing in the *Tower* and *Lusthaus* cases which, upon penalty of having to pay taxes upon income not received, prohibits a father from assisting his sons in acquiring property from an outsider in a bona fide, arms-length transaction.

If W. O. Culbertson & Sons was a partnership valid for tax purposes, the partnership income is taxable to the members in keeping with Sections 181, 182 Internal Revenue Code (28 U.S.C. Sec. 181, 182). To sustain its position that the sons' one-half of the partnership income is taxable to Respondent, the Government must establish the invalidity, for tax purposes, of of that partnership and that, ignoring the invalid partnership, such income would have been Respondents and taxable to him. But, indisputably, the transfer from Coon to Respondent, the transfer from Respondent to the Culbertson boys, and their entrance into the partnership were but phases of one transaction. If W. O. Culbertson & Sons is ignored and the conveyance to the Culbertson boys is held ineffective, what remains to indicate that Respondent would have acquired the Coon interest or would have been taxable on the income therefrom? Respondent tried, unsuccessfully, to purchase Coon's interest for his own account. Speculation cannot take the place of probative evidence; an inference must necesarily yield to evidence of the actual occurrence. *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, 340; 53 S.Ct. 391, 394, 77 L. Ed. 819; *Foran* v. *Commissioner*, (CA5) 165 F.2(d) 705; *Lueders Estate* v. *Commissioner*, (CA3) 164 F.2(d) 128.

II.

We submit that, in this case, the Tax Court erroneously disregarded and improperly applied certain principles announced in the *Tower* and *Lusthaus* cases, if such cases are applicable; and that the decision of the Court of Appeals was an appropriate correction.

In *Commissioner v. Tower*, Tower owned approximately 9/10ths of the stock of a corporation manufacturing machinery and was confronted with the prospect of large profits and taxes; following the recommendation of tax advisers, he transferred to his wife some 4/10ths of the stock "on condition that she place the corporate assets represented by these shares into the new partnership", 327 U.S. at 285; the corporation was dissolved and three days later a limited partnership was organized, Tower and one other being general partners and the wife a limited partner. The wife furnished no services and the organization of the new partnership in no wise altered the conduct of the business or Tower's dominance thereof. The Commissioner taxed the wife's share of the partnership income to Tower, and before the Tax Court defended this action on the ground that the gift of stock was incomplete, the wife had contributed nothing and "her alleged membership in the partnership was a sham" 327 U.S. at 283. The Tax Court concluded that the gift was incomplete, that Tower continued to dominate the business, that the transactions merely reallocated Tower's income within the family group, that the purported partnership fulfilled no business purpose, that the income was earned by the husband and that no real partnership existed. The Court of Appeals reversed and upon certiorari, this Court affirmed the Tax Court, pursuant to *Dobson v. Commissioner*,[7] be-

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[7]320 U.S. 489, 66 S.Ct. 239, 88 L.Ed. 248. In this connection see, 26 U.S.C. Sec. 1141(a) as amended by Act of June 25, 1948, Sec. 36 of Pub. Law 773, 80th Congress, 2nd Sess.; 28 U.S.C. Sec. 875; Fed. Rules of Civil Procedure, Rule 52; *Helvering* v. *American Dental Co.*, 318 U.S. 322 at 330, 63 S.Ct.

cause the facts were sufficient to support the Tax Court's findings. In so doing, this Court considered the factual background, the prior history of the business, the reasons for and factual circumstances surrounding the creation of the partnership,[8] the subsequent history and manner of operation of the partnership, and announced (327 U.S. at 287) the decisive inquiry:

> "When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their 'agreement' considered as a whole, and by their conduct in execution of its provisions'.

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577 at 582, ... L.Ed. ....; *Bogardus* v. *Commissioner*, 302 U.S. 34, 58 S.Ct. 61, 82 L.Ed. 32; *Helvering* v. *Rankin*, 295 U.S. 123, 55 S.Ct. 732, 79 L.Ed. 1343; *Kohnstamm* v. *Pedrick*, (CA2) 153 F.2(d) 506 at 508; *Commissioner* v. *Bonwit*, (CA2) 87 F.2(d) 764.

[8]Here the Tax Court merely found that "about that time (Respondent) offered to purchase the remainder of the herd at a price around $65 per head. Petitioner's offer was accepted by Mr. Coon, provided Petitioner would sell his four sons an undivided one-half interest in the herd at the same price" (R. 33) and "Petitioner offered to finance the purchase of the undivided one-half interest for the boys" (R. 34) and ignored the undisputed evidence of Coon's motive in attaching the condition to his agreement to sell (supra p. 5), the contractual agreement under which the Culbertson boys were brought into the partnership (supra p. 5,6) and the long-range purpose they were to serve (supra p. 5-7).

Drennen v. London Assurance Company, 113 U.S. 51, 56, 5 S.Ct. 341, 344, 28 L.Ed. 919; *Cox v. Hickman*, 8 H.L.Cas. 268. We see no reason why this general rule should not apply in tax cases where the government challenges the existence of a partnership for tax purposes. Here the Tax Court, acting pursuant to its authority in connection with the enforcement of federal laws, has found from testimony before it that respondent and his wife did not intend to carry on business as a partnership. This finding of fact, since supported by evidence, is final. *Commissioner v. Heininger*, 320 U.S. 467, 475, 64 S.Ct. 249, 254, 88 L.Ed. 171; *Dobson v. Commissioner*, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248. The decision of the Tax Court was therefore correct unless, as respondent contends, the Tax Court erroneously disregarded or improperly applied certain legal principles."[9]

and (327 U.S. at 284):

"The issue is who earned the income and that issue depends on whether this husband and wife really intended to carry on business as a partnership. Those issues cannot be decided simply by looking at a single step in a complicated transaction. To decided who worked for, otherwise created or controlled the income, all steps in the

[9]The Tax Court here made no findings as to whether Respondent and the Culbertson boys "really and truly intended to join together for the purpose of carrying on business" althought the evidence was undisputed that they did so.

process of earning the profits must be taken into consideration."

The Court then held that the validity of the partnership under state law was not controlling; that while taxpayers have a legal right to reduce by permissable means the amount of what would otherwise be their taxes, a showing that the partnership arrangement was made for the purpose of reducing taxes simply lends further support to the inference "that the husband still controls the income from his partnership interest, that no partnership really exists and that the earnings are really his and are therefore taxable to him and not to his wife" 327 U.S. at 289;[10] that while legal ownership of the assets will throw light on the broader question of the reality of the alleged partnership, it was unnecessary to decide whether the Tax Court was correct in its holding that the gift was conditional and incomplete,[11] that while a husband and wife may become partners for tax purposes if she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital services, nevertheless if she does none of these things, "the Tax Court may properly take these cir-

[10]Although there is not a scintilla of evidence that motives of tax reductions were involved in the present transactions, or even thought of (supra p. 17), the Tax Court opinion does not mention this pertinent factor.

[11]See infra p. 38.

cumstances into consideration in determining whether the partnership is real" 327 U.S. at 290;[12] that the management and control of the business and the use of the income therefrom were not altered and that the purported partnership wrought no change in the economic relationship of the parties to the income but merely attempted a paper reallocation of income among the family members.[13]

Here the Tax Court limited its inquiry and discussion to facts pertaining to one — capital and services — and some parts of another of the categories of factual inquiry and legal determination this Court in the *Tower* case indicated were to be considered and determined, ignoring or passing over the remainder. The memorandum opinion of the Tax Court Judge states (R. 46),

> "The questions presented to us here are whether the business organization of W. O. Culbertson & Sons constitutes a partnership for federal income tax purposes * * *",

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[12]Here, the Tax Court considered the inquiry into the contribution of capital and the rendition of services as being the sole criterion of the tax validity of a partnership and not merely as circumstances to be taken into consideration. See *infra* p. 42-34.

[13]For the obvious reason that Respondent had not owned or been entitled to the income from the Coon one-half interest before W. O. Culbertson & Sons was organized, the Tax Court made no findings or conclusions as to changes in economic relationship or reallocation of income. See *infra* p. 45.

then incompletely states the positions of the parties, quotes the excerpt from the *Tower* case that under certain circumstances husband and wife may become partners for tax purposes, and continues (R. 47):

> "Our first consideration is to examine the business transactions to determine whether, within the language of the Tower case, the Culbertson boys actually invested any capital in the alleged partnership."

and (R. 49):

> "We consider next whether the sons contributed such services as, under the Tower case and others to the same effect, would justify recognition of a partnership."

The Court then held, as a legal matter, the ex parte December 9, 1939 document was the partnership agreement rather than the oral agreement of November, 1939 and concluded (R. 56):

> "As to the partnership question, we therefore hold for the Respondent."

This method of procedure appears to have been the rule in the Tax Court rather than the exception.[8] The

[8] "It is by now well settled that, in order to sustain a family partnership for tax purposes, it must be shown that the wife contributed either capital, or services of vital nature." *Ed-*

Tax Court gave no consideration to the substance of the transactions before it — that the partnership arose as a result of a binding contract with a third party.

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win F. Sandberg, 8 T.C. 423 at 428. See *Isaac Scherr* (10-3-47), P.H.T.C. Memo. Dec. 47,281.

1 Rabkin & Johnson, "Federal Income, Gift & Estate Taxes", P. 907b and 907c:

"*Business purpose.* In the *Tower* case, considerable emphasis was placed upon the tax avoidance motive, and upon the absence of any 'business' reality. Several lower court decisions have since indicated that a primary purpose to divide taxable income is weighed heavily against the taxpayer. See *Appel* v. *Smith*, 161 F.2(d) 121; *Scherf* v. *Commissioner*, 161 F.2(d) 495, cert. den. 332 U.S. 810; *Benson* v. *Commissioner*, 161 F.2(d) 821; *Belcher* v. *Commissioner*, 162 F.2(d) 974, cert. den. 332 U.S. 824; *Dawson* v. *Commissioner*, 163 F.2(d) 664; *Nordling* v. *Commissioner*, 166 F.2(d) 703."

"The Tax Court, however, has apparently held that tax avoidance is not an essential *Tower* factor. Conceding that the wife's interest was created solely because of business necessity, the court refused to recognize her interest where she contributed neither services nor 'original' capital. *Margaret F. Horowitz*, TC Memo., C.C.H. 15,843, P-H 47,153; cf. *Lily Ho Quon*, TC Memo. Dock. 5805, C.C.H. Dec. 15,711, aff'd 165 F.2(d) 215, cert. den. ..... U.S. .....; *Robert S. LeSage*, TC Memo., C.C.H. 16,163, P-H 47,318. On the other hand, where services justify the partnership, it is not fatal that tax avoidance was a substantial motive. *Harris T. Kille*, TC Memo., C.C.H. 15,952, P-H 47,217."

Family partnership cases are exhaustively reviewed, 6 Mertens, "Law of Income Taxation," 1948 Cumulative Pocket Supplement, p. 30 et seq.

The legal error in such procedure is noted in *Kent* v. *Commissioner* (CA6) 170 F.2(d) 131 at 136 and discussed by Robinson, "The Allocation Theory in Family Partnership Cases," 25 Taxes 963.

which called for services and skill indefinitely from the Culbertson boys, and that it involved the acquisition of additional property and income rather than the splitting of pre-existing income — nor did it inquire into whether the parties really and truly intended to join together to carry on business, who really earned the income in question, the bona fides of the parties and the presence or absence of tax reduction motives, whether the partnership wrought a real change in the economic relationship of the parties to the income, whether the income in question was available to and under the control of Respondent, and whether the transactions were " mere paper reallocation of income among the family members."

When the Tax Court, or any trial court, either misconceives the scope and applicability of principles established by this Court, or ignores such principles or misinterprets them, or does all of these things, it becomes the duty of the Courts of Appeal to correct such error.[15] That is what the Court of Appeals

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[15]Section 1141(c)(1) Internal Revenue Code (28 U.S.C. Sec. 1141(c)(1) dealing with review of decisions of the Tax Court by the Courts of Appeal, provides:

"(c) Powers—(1) To affirm, modify or reverse.—Upon such review, such Court shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a re-hearing, as justice may require."

See *Wbosley* v. *Commissioner*, (CA6, 1948) 168 F.2(d) 330. *Kent* v. *Commissioner*, supra note 14; *Hartz* v. *Commissioner*

did here and, when the found and undisputed facts of this case are measured by the principles of the *Tower* and *Lusthaus* cases, it is respectfully submitted such was the only proper action the Court of Appeals could have taken.

It is not our intention to re-argue the facts of the case nor any specific finding or conclusion of the Tax Court — nor, indeed, would this Court be interested in any such procedure — but, as the case is posed, we believe it our duty to point to Tax Court findings which sustain the action of the Court of Appeals, and to undisputed evidence pertaining to some issue ignored by the Tax Court but emphasized by this Court in the *Tower* case, and to improper applications by the Tax Court of *Tower* principles, and to the corrective action taken by the Court of Appeals.

First. The ultimate test. In keeping with the rule established in the *Tower* case, the Court of Appeals stated (R. 187):

"The inquiry as to a family partnership for income tax purposes must relate to evidence bearing

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(CA8) 170 F.2(d) 313 at 318; in *Helvering* v. *American Dental Co.*, supra, note 7, this Court stated (318 U.S. 330): "We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon an application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence and without judicial review the tests to be applied to facts to determine whether the result is or is not a gift."

> on the reality, the actuality and the bona fides of the transaction or the absence thereof. Where the proof conclusively shows that a family partnership was entered into for the benefit of the business and not for the purpose of evading, avoiding or dividing, income taxes, it will be deemed a partnership for income tax purposes even as it was recognized in the law for all other purposes."

The Tax Court in the present case made no findings with respect to such test, nor was it taken into account.

Second. Tax reduction motives. In the *Tower* case this Court held that the presence of an express purpose to reduce taxes lends support to findings that the husband still controls the income, that no partnership really exists, and that the earnings of the partnership are really his. 327 U.S. at 289. It follows that the absence of such purpose, express or implied, lends support to the reality of the partnership under investigation. The nature of the transactions leading to W. O. Culbertson & Sons intrinsically demonstrates that tax reduction motives were not involved; the testimony, without a word or implication to the contrary, is that taxes were not mentioned during the transaction resulting in the creation of the partnership and had no bearing whatsover upon what was done (R. 80, 97, 112), nor, in fact, did the possibility of tax effects occur to the parties (R. 97, 112). The Tax Court did not mention these factors.

Third. The partnership agreement. The uncontradicted evidence discloses that Coon disposed of his interest on condition that the Culbertson boys take his place in the partnership (R. 75, 78), that a partnership was organized by oral agreement around November 1, 1939 (R. 80, 90, 98, 103, 107) and that this partnership was widely publicized during October and November, 1939.[16] While there are no specific findings on the point, the Tax Court apparently held (R. 50-53) that the ex parte document of December 9, 1939 was the partnership agreement. The Court of Appeals, noting the undisputed objective in having this document prepared, its ex parte nature (R. 184, 185), and the fact that the Culbertson boys were unaware of its existence until long afterwards (R. 184) held, as a matter of law, that the document could not be an agreement and was without legal force or effect, that undue weight and emphasis given this document by the Tax Court lead it to erroneous holdings, and that the real partnership agreement was the oral one predicated on the November 6, 1939 bill of sale to the boys (R. 182,183,185). *Hartz* v. *Commissioner*, supra, and cases cited notes 7 and 15.

[16] Letter of October 23, 1939 to the finance company (R. 77, Ex. 4, R. 136); newspaper story of December 2, 1939 (R. 77, Ex. 3, R. 135); Hereford Association certificate of November 13, 1939 (R. 77, Ex. 7, R. 143); Wright's testimony of his notification of the partnership (R. 81-83); bank accounts were opened upon which all could check (R. 95) and partnership books set up (R. 93) and stationery printed containing the names of all partners (R. 110).

Fourth. Contributions of capital. In the *Tower* case this Court noted that one of the matters throwing light upon the reality of questioned partnerships was the legal ownership of the capital contributed by the questioned partner and that one of the elements was the investment of capital originating with the questioned partner. 327 U.S. 290. The Tax Court here *found* that Coon stipulated the Culbertson boys were to acquire a one-half interest in the brood herd (R. 33), that Respondent "offered to finance the purchase of the undivided one-half interest for the boys" (R. 34), and that, upon receiving the bill of sale to all of the cattle from Coon & Culbertson, Respondent executed a bill of sale to the four Culbertson boys covering an undivided one-half interest in the same cattle involved in the previous bill of sale (R. 34); that this November 6, 1939 bill of sale was given to W. O. and the next day the boys gave to Respondent a note for $49,720.00 due one year from date at four per cent interest "for the one-half undivided interest in the cattle described in the bill of sale" (R. 34); that Coon & Culbertson owned other property, cattle, grass leases, horses, etc., which were "not conveyed to Petitioner or his sons in the foregoing transaction" hence, when W. O. Culbertson & Sons agreed to purchase them, the boys' note was increased and, during the tax years, discharged by a credit, gifts from Respondent, and by profits of the cattle to the extent of two-thirds of the note (R. 34, 35, 48). The Tax Court held that the boys did not buy their interest from Coon (R. 47) but from Respondent (R. 48). The

testimony is undisputed that the Culbertson boys considered themselves unconditionally obligated to pay the note (R. 76, 89, 90, 92, 109). Respondent had testified (R. 118),

> "At the time the boys gave me this note it was due and payable one year after date. With respect to whether I felt the boys would be able to pay it off in a year, I didn't give it much thought at all; I just told them we would make the note for a year. I made them that proposition — finance it in one year. I didn't intend for these to be gifts to the children; I never gave it any thought at the time."

And from this the Tax Court concluded (R. 48),

> "There is no essential difference, under all the facts here, between a gift of a capital contribution by a father or husband in the beginning, and the gift of it later when the father forgives the notes, particularly in the light of the father's testimony, relative to whether he felt the boys would be able to pay in the one year specified in the note * * * We think he did not expect or intend them to pay it."

The Tax Court further held (R. 49) that an indeterminate part of the capital contributions — the difference in value between one-half of the brood herd (the cream of the crop (R. 73)) and the purchase price, (the average price previously received by the

old partnership for pure-blood, commercial, grade cattle and Brafords (R. 73)) — was not contributed by the Culbertson boys because (R. 49) Respondent testified that the purchase price was around $65 per head (R. 127) for the 1400 odd cattle, a one-half interest in which was purchased from Coon, whereas on December 31, 1940 (fourteen months after the purchase from Coon) the partnership inventoried (on a basis of cost or market which ever is lower (R. 168)) 2,191[17] head of cattle (R. 127) at an average price of $60 per head. The Court of Appeals noted that the November 6, 1939 bill of sale to the Culbertson boys was pursuant to Respondent's agreement with Coon, that it was absolute, with no strings attached (R. 182), and that "there is not the slightest proof in the evidence but that the four Culbertson boys each acquired a one-fourth interest in the one-half interest of Coon in the cattle in question" (R. 182-3).

In the case of a tax inspired, conditional transaction taking the form of a sale to a wife who was not intended to be a real partner, followed by a partial, agreed repayment from profits, this Court held in *Lusthaus* v. *Commissioner* that the wife was not a genuine partner, but that case is not in point here. There was no sham in these transactions nor anything artificial about what was done; the October-November, 1939 transactions were in substance what they appeared to be in form. The question of law here

[17] Which, of course, included calves dropped in the fourteen months (R. 102).

posed is whether an arms-length, bona fide sale on credit by a father to his experienced sons, pursuant to the father's contract with a third party, is an adequate basis for the ensuing partnership, in the present and future operations of which it was contemplated and agreed by all parties the sons were to take a vital and leading part. Our investigation has revealed no Supreme Court case directly in point. In the *Tower* case the effectiveness of the gift was not decided. *Lucas* v. *Earl*, 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731; *Helvering* v. *Horst*, 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75 and cases stemming therefrom are distinguishable because (1) this was not a gift of income but a transfer of property which later produced income and (2) the conveyance by Respondent was pursuant to a binding contract with Coon. See *Blair* v. *Commissioner*, 300 U.S. 5 at 11. This Court has never departed from the principle that the income of unconditionally-transferred property — as distinguished from a transfer of the right to the income — is taxable to the transferee. *Blair* v. *Commissioner*, supra; *Commissioner* v. *Tower*, supra; *Pearce* v. *Commissioner*, 315 U.S. 543, 62 S.Ct. 754, 86 L.Ed. 1016. That principle, it is submitted, has applicability here. The Tax Court neither found nor concluded that the sons' note to Respondent, when given, was not a valid, enforceable, unconditionally-payable obligation; nor did it find or conclude that Respondent's bill of sale to the sons, on the date it was given, was conditional or that it conveyed less than the fee simple title; nor did it find or conclude that these transactions were,

on that date, colorable or other than what they seemed; and the undisputed evidence is compelling that all were unconditional, effective and bona fide. How then were these transactions made colorable and ineffective? The Tax Court says that Respondent's ex parte, subsequent activities had that effect: In December, 1940 and June, 1941 he voluntarily forgave a part of the note; and, unknown to the Culbertson boys and merely for the purpose of securing a line of credit for the partnership, he signed a document purportedly reconveying an undivided one-half interest to the sons but upon restrictive conditions. It is submitted that upon such clear cut evidence, the Tax Court's legal conclusion is indefensible, as the Court of Appeals found it to be (R. 184, 185).

Fifth. Rendition of services. The *Tower* case indicates that one element in the determination of the reality of family partnerships is an inquiry into whether the wife contributes to the management of the business or otherwise renders vital services. The evidence as to the business and educational qualifications and services of the four Culbertson boys and the purpose they were to serve as partners has been set out. Supra p. 5,6. In its findings the Tax Court summarized the boys' experience (R. 32, 44); it found that after W. O. Culbertson & Sons was formed, W. O. continued to work as foreman under the same arrangement as for Coon & Culbertson (R. 35); that Richard, Joe Jack and Eugene rendered some ser-

vices during the tax years but that Richard upon graduation from college in May, 1940 went directly into the Army and Joe Jack had to quit college due to the war (R. 44); that Respondent looked after the office and "was at the ranch frenquently during the taxable years, an average of a little more than once each month" (R. 44); that (R. 45),

> "The essentials of fine Hereford breeding involves three phases. One is feed and care and a understanding of type of feed for certain ages and classes of animals. Constant care is required and it is essential to have proper blood lines; also to maintain those lines and to understand outcrops and the types of breeding desired."

It concluded that the three younger sons contributed no vital services (R. 49); that W. O. is in a different position but that he contributed no services to the partnership (R. 50);

> "We think in general that services do not greatly effect this case" (R. 50) * * * "The bare legal title to the assets is not the essential element in the production of the income. The evidence before us of the necessity for business management and care in the raising of fine Hereford cattle will not permit a conclusion that income is derived from ownership of the cattle, 'constant care' was required, 'proper brood blood lines' are necessary and understanding of 'outcrops in the types of breeding are essential' " (R. 56).

There were no findings concerning the participation by the four sons in management problems although, upon inquiry by the Court, Respondent testified without dispute that all of the members of W. O. Culbertson & Sons participated in and determined the policies of the partnership (R. 129).

The Court of Appeals concluded that these conflicting and diverse Tax Court holdings, shocking to those who look at the actualities,[18] could not be accepted (R. 182-4); further that it was not illegal tax-wise for a partnership to be formed in consideration and contemplation of services to be rendered in the future by the partners (R. 185); that a partnership is formed to act in the future and when it is fully expected, intended and agreed that the incoming partners will render services, the Government should not be allowed to take advantage of a failure to render such services caused by enlistment in the Army (R. 187).

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[18]W. O., ranch-reared, thoroughly experienced, and educated in Animal Husbandry, was in complete charge of the hundreds of cattle on the 52,000 acre ranch and of all the men and activities thereof (R. 78, 79, 94, 110, 118). Respondent testified, " I never endeavored to tell W. O. Jr. how this ranch should be run" (R. 111). It is most difficult to understand who, if not W. O., was responsible for the "essential", "constant care of the cattle"; assuredly Respondent, aging, injured and unable to do physical work (R. 111) who went to the ranch on an average of once a month (R. 44) could neither discharge or supervise such responsibilities. It is likewise difficult to accept the Tax Court conclusions that $1,200.00 per year was adequate compensation for a college educated, married man — W. O. — carrying such responsibilities (R. 35, 50).

These appropriate conclusions, based upon the underlying premise of the Coon-Respondent contract of sale and the history of the tax years — that the Culbertson boys were to take Coon's place in the partnership and carry on idefinitely the breeding program; and that Richard and Joe Jack failed to perform ranch work during a part of the tax years due to Army service — have been smilarly voiced by other Tax Court Judges[19] and, quite recently, by the full Tax Court.[20]

Sixth. Economic Changes. In the *Tower* case this Court indicated that no real change in the economic relationship of the husband and wife to the income in question was brought about by the purported partnership, that no capital not available for use in the business before was brought into the business by the formation of the partnership, and that the partnership was a mere paper reallocation of income among the family members. 327 U.S. at 291. In the present case the Tax Court gave consideration to none of these factors.

In this case we are not dealing with one family but three existing families and two budding families: during the tax years W. O. and Richard were married

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[19] *Harry P. Samuels*, 1945 (P-H) T.C. Memo. Dec. 45,284; *Mack Perlman*, 1947 (P-H) T.C. Memo. Dec. 47,286; *Camillo Cicinelli*, 1947 (P-H) T.C. Memo. Dec. 47,264.

[20] *Isaac Blumberg*, 11 T.C. ....., 10-25-48, reviewed by the whole court.

and living apart from Respondent's family, and Joe Jack and Eugene were approaching marriageable age (R. 93). We are not dealing with income which, prior to the creation of W. O. Culbertson & Sons, had belonged to any of the members of that partnership; it came to the sons, or this family, solely as a part of the circumstances from which this partnership sprang; hence it could not have been used previously by any one here involved and there is no evidence that it was used by or for Respondent's benefit in the tax years. Respondent did not dominate this partnership (R. 90, 98, 111, 129). Unless what we believe to be the impossible feat of dividing the initial agreement of sale into one valid phase (Respondent's acquisition of the Coon interest) and two invalid phases (the transfer to the sons and the organization of the partnership), is accomplished, capital was brought into the business of this partnership by its creation. Obviously no paper reallocation of income was involved because, insofar as all members of this partnership, including Respondent, were concerned, the income in question had not previously existed.

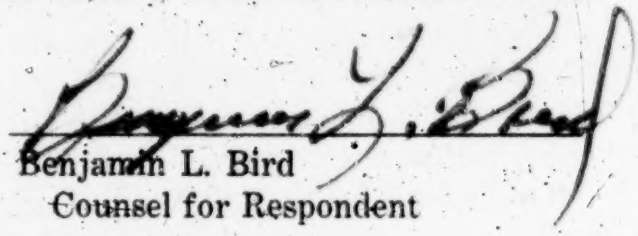
CONCLUSION

R. S. Coon, forced to retire, determined to do what he could to preserve and perpetuate the results of his lifetime avocation — the breeding of fine Herefords. To accomplish this end, he might have selected Respondent but he thought the latter too old, or he might have selected his nephew, W. H. Coon, who was at hand — but he did neither. He had observed

the Culbertson boys for many years and his choice fell upon them, and, whether it be called capital or services or something else, the Culbertson boys had sufficient to contribute to the resulting organization to cause Coon to condition the sale of his interest upon their acquisition of it. Coon initiated the transfer of title to the boys and the organization of W. O. Culbertson & Sons, and the function the sons were to perform was the lifetime job of "carrying this herd" into the future. The Culbertson boys acquired their interest indirectly from Coon and, somewhat coincidently, Respondent financed the acquisition upon their unconditional agreement to repay. There was no semblance of fiction, sham or artificial motivation in these transactions; Respondent and his sons really and truly intended to join together for the purpose of carrying on business and sharing in the profits and losses. The Culbertson boys made the partnership possible; they supplied and are supplying one of the two forms of consideration moving to Coon for his interest in the cattle; later through their services — primarily those of W. O. — three-fifths of the purchase price of their interest were repaid to Respondent out of profits; they performed services for the partnership, in part by direct work and in part by qualifying themselves to better serve it; they are carrying the herd on. There being nothing unreal or spurious about these transactions, the ex parte document of December 9, 1939, considering the purpose for which it was executed, and Respondent's forgiveness fourteen and twenty months later of

two-fifths of the purchase price could not destroy the pre-existing reality and the economic genuineness of the partnership. This forgiving of a part of the note was no doubt a gift, but in what better way could Respondent have provided himself with old-age security? Any attempt to attribute the earnings of the sons' one-half of the cattle to Respondent runs squarely into the solid facts that he never owned this interest in the cattle and that his efforts did not produce this income. Respondent had no more power or control over the sons' one-half interest or the income arising therefrom than the sons had over his one-half interest in the cattle and income; all questions of major policy were decided by all partners. From the economic and tax viewpoint, this partnership took nothing from Respondent which belonged to him prior to its organization; no reallocation, paper or otherwise, of his income was brought about by its organization.

For all of the foregoing reasons it is respectfully submitted that the decision of the Court below should be affirmed.



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APPENDIX

INTERNAL REVENUE CODE:

SEC. 11. NORMAL TAX ON INDIVIDUALS.
There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.

(26 U.S.C. 1946 ed., Sec 11.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, v ocations, trades, businesses, commerce or sales, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.
Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1946 ed., Sec 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him —

* * * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1946 ed., Sec 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof —

* * * * *

(2) *Partnership and Partner.* The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U.S.C. 1946 ed., Sec 3797.)

SEC. 1141. COURTS OF REVIEW.

(a) Jurisdiction.—The circuit courts of appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in Civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

(c) Powers.—

(1) To affirm, modify, or reserve.—Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

(26 U.S.C. Sec. 1141(a)(c))

28 U.S.C. SEC. 875:

"875. *Review in cases tried without jury.* When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

APPENDIX B

REPRESENTATIVE TAX COURT CASES SHOWING PRACTICE OF DETERMINING FAMILY PARTNERSHIP CASES ACCORDING TO CAPITAL — SERVICES RULE OF THUMB.

Citations are to 1946, 1947 and 1948 Prentice-Hall Memorandum Decisions.

Name	Date	Citation
O. W. Fode	8-9-46	46,199
David O. Davis	10-21-46	46,249
Nestor J. Decker	12-2-46	46,278
J. E. Hurley	2-11-47	47,027
Julias B. Blaek	2-10-47	47,039
W. R. Winchester	3-25-47	47,073
David Paransky	2-20-47	47,038
Margaret Horowitz	6-12-47	47,153
S. E. Boozer	8-28-47	47,248
Camillo Cicinelli	9-30-47	47,264
George Rees	10-24-47	47,288
Robert S. LeSage	12-3-47	47,318
L. W. Seabrook	12-12-47	47,323
Gil Graber	1-14-48	48,001
Robert H. Cole	1-25-48	48,023
Chris Nelson	3-22-48	48,039
Martin Rosol	3-30-48	48,004
Sefer A. Markley	4-14-48	48,056
J. Newman	6-10-48	48,099
Herman Schaeffer	9-13-48	48,181
Arch Martin	10-25-48	48,215
M. M. Monroe	7 T.C. 282	
Edwin F. Sandberg	8 T.C. 423	
Estate Ira L. Berk	7 T.C. 928	
John G. Scherf	7 T.C. 346	